Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

EDWARDO RIVERA,

Petitioner,

vs.

SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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8088

(1a) QUESTIONS PRESENTED

1. Where defendant is found guilty in a bench trial, where the sole evidence against defendant is a single identification by one stranger of another, and where in response to a motion for new trial, the trial judge finds he has doubt as to the propriety of his decision that there was sufficient evidence to convict beyond a reasonable doubt, stating:

> "This being a single witness identification case in essence the law is [that] a single witness must convince the trier of fact beyond a reasonable doubt of that identification. Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case. And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted. I am going to grant his motion for me to reconsider. I will vacate the

finding of guilt, reinstate his plea of not guilty." (App. A, pp. 1-2),

(A) Is his expression of doubt such that a retrial violates the Double Jeopardy provision of the 5th Amendment to the U.S. Constitution?

(B) Is the 7th Circuit's holding that the trial court's ruling does not amount to an acquittal for double jeopardy purposes, in conflict with this Court's holdings as to the definition of an "acquittal" in such decisions as Hudson v. Louisiana, 450 U.S. 40 (1982); Smalis v. Pennsylvania, 476 U.S. 140 (1986); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984); United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Burks v. United States,

437 U.S. 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); and United States v. Sisson, 399 U.S. 267 (1970)?

2. Is the issue - whether a grant of a new trial, by a judge sitting as a trier of fact, based upon his belief that he may be wrong as to whether the State proved defendant guilty beyond a reasonable doubt, is an acquittal for double jeopardy purposes - a matter of federal constitutional law that must be decided by a federal court on a de novo standard?

(1b) Parties Involved

Petitioner, Edwardo Rivera, was Petitioner in the U.S. District Court, N.D. Ill., E.D., and Appellee in the U.S. Court of Appeals for the 7th Circuit.

Respondent, Sheriff of Cook County, Illinois, was Respondent in the District Court and Appellant in the 7th Circuit.

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"This being a single witness identification case in essence the

> law is [that] a single witness must convince the trier of fact beyond a reasonable doubt of that identification. Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case. And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted. I am going to grant his motion for me to reconsider. I will vacate the finding of guilt, reinstate his plea of not guilty." (App. A, pp. 1-2),

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edwardo Rivera, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the 7th Circuit, reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which had granted his petition for writ of habeas corpus.

Judgment and Order Below

The Judgment sought to be reviewed is the Opinion of the 7th Circuit decided December 3, 1998 (App. A), reported at 162 F.3d 486, reversing the judgment of the U.S. District Court,

N.D. Ill. E.D. (App. C), which had granted habeas relief.

Jurisdictional Statement

On December 3, 1998, the Court of Appeals issued its Order (App. A) reversing the District Court's judgment (App. C) which had granted habeas relief. Petition for rehearing and suggestion for rehearing en banc was denied February 1, 1999. (App. B)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10, 12 and 13 of this Court.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance - the District Court - is 28 U.S.C. § 2254(a).

Constitutional Provision

The constitutional provision involved is the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

After petitioner was convicted of murder in a bench trial, in a single-witness identification case, the court vacated the conviction and set the matter for trial before a different judge. (See App. A, pp. App 1-2; App. C, p. App. 18) After his motion for double jeopardy discharge was denied, the Illinois Appellate Court affirmed and the Illinois Supreme Court denied petition for leave to appeal (App. C, p. App. 19), petitioner sought a writ of habeas corpus in the U.S. District

Court, seeking to bar retrial based on the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution. The District Court granted habeas (App. C), and the 7th Circuit reversed (App. A) and denied rehearing in banc. (App. B)

Statement of Facts[1]

On March 30, 1993, Weydowing LaPorte, Jacqueline Vicario and Samuel Ponte were driving home from a movie around midnight when a car pulled up behind them and shone bright lights into their car. The second car then pulled alongside them, and a man with a

---

[1] These facts are set out verbatim, directly from the District Court's Revised Memorandum Opinion granting habeas relief - except for the indicated omission, at pp. 10-11, infra, from p. App. 19, of a single footnote (re bond). (App. C, pp. App. 12-19)

mustache and goatee fired gun shots into their car, killing LaPorte. One month later, petitioner was arrested and charged with the crime. Petitioner was tried before a judge rather than a jury, The main evidence presented against him was the testimony of Jacqueline Vicario.

At trial, petitioner's attorney elicited testimony from Vicario that indicated the bright light adversely affected her vision during the crime. About 35 days after the crime, Vicario viewed a photographic spread and, that evening, she was shown a line-up. Tr., 38-39. Her testimony also implied that the line-up procedures were suggestive. For example, Vicario identified petitioner out of a line-up in which he was the sole person with a mustache and

goatee.

> Q: And in fact none of the other men in the line up had a goatee, did they?
>
> A: No they didn't.
>
> Q: Huh?
>
> A: No they didn't.
>
> Q: So you were only shown one picture of one man in a line up who had a goatee, correct?
>
> A: Yes.

Transcript of the Proceedings, Oct. 5, 1994 (Tr.), 39. Vicario also stated that she only picked petitioner out of the line-up after having seen his photograph and having been told that that very person would be in the line-up.

> Q: [The police officer] told you that the person whose picture you picket out you were going to see in the pine up?
>
> A: Yes.

> Q: And he told you that your job at the line up was to see if the person whose picture you were on was on fact in the line up?
>
> A: Yes.
>
> Q: And so you went to the line up and you said to the police officer, 'the man whose picture I picked out I now see him in the line up,' correct?
>
> A: Yes.

Tr., 38-39. Vicario also admitted at trial that she told private detectives -- who she thought were police officers -- that she was unsure about the identification she had made.

> Q: Well did they, let me ask you this question: Let me ask you what, were these questions put to you and did you give these answers.
>
> > Question: 'If you were sworn under oath in a Court of law before a judge or jury and they said is this the man who shot [the victim] in front of you, could you positively say it was or absolutely say it as him?'

Answer: 'No.'

'Are you sure?'

Answer: 'Yes.'

Question: 'No way?'

Answer: 'No.'

Were those questions and answers put to you?

A: Yes.

Q.So you told them that you weren't sure, correct?

A: Yes.

Tr., 36

Q: You thought [the detectives] were from the police right?

A: Yes.

Q: So you told people who you thought were, in your opinion, part of the Chicago police that you were not sure about your identification, correct?

A: Yes.

Q: And you told people who you believed that you were doubtful about your ability to make an

identification?

A: Yes.

Tr. at 49.

The other witness in the car stated that the petitioner resembled the assailant, but only offered a tentative identification. See Respondent's Ex. H, at 5. Petitioner testified that he did not commit the crime. On November 10, 1995, the trial judge found petitioner guilty of murder, attempted murder and aggravated discharge of a firearm. He permitted petitioner to remain free on bond until sentencing.

Petitioner filed a motion for a new trial, arguing that Vicario's identification was insufficient evidence on which to convict him. On January 13, 1995, after hearing oral arguments, the

trial judge granted the motion for a new trial.

> The Court: This being a single witness identification case in essence the law is a single witness must convince the trier of fact beyond a reasonable doubt of that identification.
>
> Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case.
>
> And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted.
>
> I am going to grant his motion for me to reconsider. I will vacate the finding of guilt, reinstate his plea of not guilty. And I am going to order that he be back here to stand trial before another Judge in this courtroom on February 6th.

Transcript of the Proceedings, Jan. 13, 1995, 6-7. Petitioner filed a motion for double jeopardy discharge before the new judge, but the motion was denied. Remaining free on bond [footnote

omitted], petitioner appealed that decision. The Illinois Appellate Court affirmed the judgment, and the Illinois Supreme Court denied a Petition for Leave to Appeal.

REASONS FOR GRANTING CERTIORARI

1. Where defendant is found guilty in a bench trial, where the sole evidence against defendant is a single identification by one stranger of another, and where in response to a motion for new trial, the trial judge finds he has doubt as to the propriety of his decision that there was sufficient evidence to convict beyond a reasonable doubt, stating:

> "This being a single witness identification case in essence the law is [that] a single witness must convince the trier of fact beyond a reasonable doubt of that identification. Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case. And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted. I am going to grant his motion for me to

reconsider. I will vacate the finding of guilt, reinstate his plea of not guilty." (App. A, pp. 1-2),

(A) The trial judge's expression of doubt is such that a retrial violates the Double Jeopardy provision of the 5th Amendment to the U.S. Constitution; and

(B) The 7th Circuit's holding that the trial court's ruling does not amount to an acquittal for double jeopardy purposes, conflicts with this Court's holdings as to the definition of an "acquittal" in such decisions as Hudson v. Louisiana, 450 U.S. 40 (1982); Smalis v. Pennsylvania, 476 U.S. 140 (1986); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984); United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Burks v. United States, 437 U.S. 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Sisson, 399 U.S. 267 (1970).

2. The issue - whether a grant of a new trial, by a judge sitting as a trier of fact, based upon his belief that he may be wrong as to whether the State proved defendant guilty beyond a reasonable doubt, is an acquittal for double jeopardy purposes - is a matter of federal constitutional law that must be decided by a federal court on a de novo standard.

* * *

1. Under the circumstances here:

A. The trial judge's expression of doubt renders his action an acquittal for double jeopardy purposes, such that retrial is barred by the 5th Amendment Double Jeopardy Clause.

Here, the sole issue before the trial court, at the trial and at the motion for new trial, was whether the single eyewitness testimony was sufficient to overcome the presumption of innocence - and in his - the Judge's, mind, prove defendant guilty beyond a reasonable doubt. There were no procedural errors upon which he could have granted a new trial. When he granted a new trial because he was not sure if the evidence proved defendant guilty beyond a reasonable doubt - "I am not going to take the chance of my

mistake leading this man to be wrongfully convicted" - the result must be an acquittal and a bar to further trial. Hudson v. Louisiana, 450 U.S. 40 (1982).

This is not a situation where, after a jury trial, a judge grants a new trial, Tibbs v. Florida, 457 U.S. 31 (1982), upon belief that errors occurred, or where a new trial is granted in a manner similar to when a reviewing court grants a new trial. Here, where the judge is the sole arbiter of whether there is a reasonable doubt - and he has doubt - this is an acquittal barring re-trial. As stated by the District Court:

> "The trial judge in this case had a legal obligation to deny the new trial motion (which was based on the sufficiency of the evidence)

and sustain the conviction if he was convinced beyond a reasonable doubt of petitioner's guilt. See e.g., United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992) (holding that jury was properly instructed that it has a duty to convict if convinced beyond a reasonable doubt of defendant's guilt, and stating that such instruction was legally accurate). We presume that he knew the law and applied it in making his ruling. See Walton v. Arizona, 497 U.S. 639, 653 (1990). The irresistible inference, therefore, is that by reconsidering the finding of guilt, vacating the conviction and ordering a new trial, the trial judge acquitted petitioner.

This conclusion is consistent with the Supreme Court's definition of an acquittal - a precedent the Illinois Appellate Court disregarded entirely. . . . [for citations and omitted material, see Point 1(B), infra.] An acquittal occurs when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' [United States v.] Scott, 437 U.S. [82] at 97 [(1978)] (quoting [United States v.] Martin Linen [Supply Co.], 430 U.S. [564] at 571

> [(1977)]. This definition focuses on a resolution of factual issues, not on grounds unrelated to guilt or innocence. Id. [Scott] at 98 & n.11 (commenting that a prejudicial pretrial delay does not relate to guilt or innocence, but hypothesizing that the insanity defense does). [fn. omitted] Here on the motion for a new trial, the issue before the trial judge (and fact-finder) was petitioner's guilt or innocence. In particular, the question was whether the eyewitness identification could establish petitioner's guilt beyond a reasonable doubt. In ruling on the motion, the trial judge resolved the issue in petitioner's favor." (App. C, pp. App. 34-37)

When the factfinder - a judge - expresses that he is not convinced beyond a reasonable doubt - he must acquit. He is required to by the presumption of innocence. He can't state - I am not convinced - but I shall grant the State another opportunity and grant a new trial so the State can start over again. This would violate double

jeopardy.

The same situation exists here. Permitting re-trial would violate the very purpose of the Double Jeopardy Clause.

The 7th Circuit reversed the District Court for different reasons. Judge Cudahy, in a concurring opinion, concluded that where a bench trial is had, granting a new trial because the judge is not convinced beyond a reasonable doubt "does not mean no reasonable factfinder could have been convinced beyond a reasonable doubt of Rivera's guilt." (App. A, p. App. 9) This position is, of course, wrong, and this Court should grant certiorari to resolve the crucial issue whether, where uncertainty exists in the mind of the

trial judge as to the sufficiency of the evidence in a bench trial to prove defendant's guilt beyond a reasonable doubt, a new trial and not an acquittal can be granted - a result that is contrary to the purposes of the Double Jeopardy Clause.

Certiorari should be allowed to resolve the question whether the trial judge's expressions of doubt, in this context, amount to an acquittal for double jeopardy purposes, barring re-trial.

B. The 7th Circuit's holding that the trial court's ruling does not amount to an acquittal for double jeopardy purposes, conflicts with this Court's holdings as to the definition of an "acquittal" [cases as set out in the caption, 1(B), p. 12, supra].

As the District Court observed:

> "This conclusion [that retrial here would violate the Double

> Jeopardy Clause] is consistent with the Supreme Court's definition of an acquittal - a precedent the Illinois Appellate Court disregarded entirely. See Smalis, 476 U.S. at 144 & n.6; Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 309 (1984); Swisher v. Brady, 438 U.S. 204, 226 (1978) (dissent); United States v. Scott, 437 U.S. 82, 97 (1978); Sanabria v. United States, 437 U.S. 54, 71 (1978); Burks, 437 U.S. at 10; United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); see also Sisson, 399 U.S. at 290. An acquittal occurs when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' Scott, 437 U.S. at 97 (quoting Martin Linen, 430 U.S. at 571)." (App. C, pp. App. 35-36)

The 7th Circuit's opinion (App. A) conflicts with this Court's decisions relied on by the District Court (App. C, pp. App. 31-33 & 35-36), holding it is what a court does, not necessarily what it says, that governs the interpretation

of an order, and that the reviewing court's duty is to analyze the substance of the court's ruling, not the label attached to it. For example:

In Hudson v. Louisiana, 450 U.S. 40 (1982) (App. C, p. App. 31), this Court held that an order granting a motion for new trial entered upon the trial court's finding that the evidence was legally insufficient to sustain the jury's verdict, was tantamount to an acquittal and barred retrial on double jeopardy grounds - even though the trial court had ordered a new trial.

In United States v. Sisson, 399 U.S. 267, 290 (1970), in concluding that an order of "arrest of judgment" following a conviction was actually, in context, an acquittal, this Court held

that the trial judge's characterization of his own action cannot control the classification of the action.

Accord: Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986) (grant of demurrer [at close of bench trial, on grounds of insufficient evidence] was actually an acquittal). See also United States v. Jenkins, 420 U.S. 358 (1975), where this Court extended double jeopardy principles, from the usual context of jury trials, to the (then) infrequent context of bench trials.[2]

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[2] In Jenkins, where after trial (for knowingly refusing to submit to induction in the armed forces), the trial court had ordered the indictment dismissed and defendant discharged, and it was not clear to this Court that the trial court found against the defendant on all the issues necessary to establish guilt, id. at 367-68, and there was an absence of finding as to the essential statutory element of "knowledge," ibid.,

It is thus abundantly clear, that it is what a court does, not what it says, that governs whether a given action is or is not an acquittal for double jeopardy purposes.

Certiorari should be allowed because the 7th Circuit opinion (App. A), reversing the District Court's grant of habeas here (App. C), conflicts with the foregoing Supreme Court precedent as to what constitutes an acquittal.

2. The issue - whether a grant of a new trial, by a judge sitting as a trier of fact, based upon his belief that he may be wrong as to whether the State proved defendant guilty beyond a reasonable doubt, is an acquittal for double jeopardy purposes - is a matter of federal constitutional law that must be decided by a federal court on a de novo standard.

---

this Court held that the prohibition against double jeopardy precluded retrial. Id. at 370.

The 7th Circuit improperly gave controlling deference to the Illinois courts' determination that Judge Strayhorn's post-trial ruling was not an acquittal. (App. A, pp. App. 5-6) The 7th Circuit improperly characterized the bottom-line determination - that is, whether Judge Strayhorn's ruling was or was not an acquittal - as a question of fact, or a question of State law (App. A, p. App. 5); in either event, the 7th Circuit held it was a matter as to which "a federal court may not reach an independent conclusion on the subject, but must respect the state courts' resolution" (App. A, p. App. 5) on habeas review. In this position, the 7th Circuit is absolutely wrong.

Whether or not a given court order

is an "acquittal" within the meaning of the federally guaranteed constitutional provision prohibiting double jeopardy, is a question of federal law. Since the conclusion in question (whether Judge Strayhorn's ruling was [functionally equivalent to] an acquittal) is a conclusion of law, it is not entitled to deference as a finding of fact would be. Rather than being entitled to deferential review, such a conclusion must be subjected to de novo review. E.g., Thompson v. Keohane, 516 U.S. 99 (1995) (in habeas context, "custody" for Miranda purposes requires de novo review); Miller v. Fenton, 474 U.S. 104 (1985) (habeas context; de novo review of voluntariness of confession); cf. Ornelas v. United States, 517 U.S. 690

(1996) (direct appeal; de novo review of probable cause/reasonable suspicion for 4th Amendment purposes).

For the same reasons this Court articulated require de novo review in these decisions, de novo review is also required in the present context. Utilizing uniform federal standards, subject to de novo review, with respect to whether a state court post-trial ruling vacating a bench-trial finding of guilt, is or is not an acquittal, is necessary in order to uniformly effectuate the federally guaranteed constitutional right not to be subjected to double jeopardy. (See Ornelas and Thompson v. Keohane, both, supra, as to reasons for requiring uniformity of interpretation and application of

federally guaranteed rights.)

Certiorari should be allowed so that this Court can determine whether in the present context, federal standards apply, and the habeas court must use a standard of de novo, not deferential, review.

C O N C L U S I O N

For the foregoing reasons, certiorari should be allowed. And, on the merits, this Court should reverse the judgment of the 7th Circuit and reinstate the judgment of the District Court, allowing habeas relief and forever barring retrial.

Respectfully submitted,

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APPENDIX C

ILLINOIS SUPREME COURT
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February 3, 1999

Mr. Frederick F. Cohn
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No. 86510 - People State of Illinois, respondent, v. Robert Patis, petitioner. Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1999.

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APPENDIX D

(SEAL)

Supreme Court of Illinois
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

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February 23, 1999

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

In re: People State of Illinois, respondent, v. Robert Patis, Petitioner.
No. 86510

The Supreme Court today entered the following order in the captioned cause:

Motion by petitioner/appellant for stay of mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court. Motion Allowed.

A copy of the order is attached.

Very truly yours,

[signed] Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Hon. Richard A. Devine

APPENDIX E

Constitutional Provisions and Statutes Involved

The 14th Amendment to the U.S. Constitution, § 1, provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Chapter 625, Illinois Compiled Statutes [ILCS], § 5/6-303(a), provides:

> **"5/6-303. Driving while driver's license, permit or privilege to operate a motor vehicle is suspended or revoked.**
>
> (a) Any person who drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such

person's driver's license, permit or privilege to do so or the privilege to obtain a driver's license or permit is revoked or suspended as provided by this Code or the law of another state, except as may be specifically allowed by a judicial driving permit, family financial responsibility driving permit, probationary license to drive, or a restricted driving permit issued pursuant to this Code or under the law of another state, shall be guilty of a Class A misdemeanor."

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 98-1703

EDWARDO RIVERA,

Petitioner-Appellee,

v.

SHERIFF OF COOK COUNTY,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 3581—**John F. Grady**, *Judge*.

ARGUED SEPTEMBER 28, 1998—DECIDED DECEMBER 3, 1998

Before CUDAHY, EASTERBROOK, and RIPPLE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. At the conclusion of a bench trial, the judge convicted Edwardo Rivera of murder. Two months later, on the date set for sentencing, Rivera's lawyer asked the judge to hold a new trial, contending that the eyewitness identification of Rivera as the killer was uncorroborated and may have been influenced by a suggestive photographic identification. After hearing argument, Judge Strayhorn (of the Circuit Court of Cook County) stated:

> This being a single witness identification case in essence the law is [that] a single witness must convince the trier of fact beyond a reasonable doubt of

> that identification. Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case. And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted. I am going to grant his motion for me to reconsider. I will vacate the finding of guilt, reinstate his plea of not guilty. And I am going to order that he be back here to stand trial before another Judge in this courtroom on February [16, 1995]. . . . [W]e will send it to some other Judge for trial. I will not retry this case.

Ever since, the parties have been debating whether the second trial Rivera sought and obtained would violate the double jeopardy clause of the Constitution.

Rivera's opposition to the (favorable) outcome of his own motion is a peculiar reason for such a long delay, now approaching four years, because it has been settled for a long time that the double jeopardy clause does not forbid a second trial when the defendant persuades a court to overturn the outcome of the first. The double jeopardy clause gives the defendant a right to keep a favorable disposition, but it does not bind him to an unfavorable turn of events if he prefers to take his chances anew. Thus if the defendant asks for a mistrial, there is no constitutional problem with another trial. *United States v. Dinitz*, 424 U.S. 600 (1976). If the defendant appeals a conviction, reversal may be followed by a new trial. *United States v. Ball*, 163 U.S. 662, 672 (1896); *Burks v. United States*, 437 U.S. 1, 13-16 (1978). Closer to the point, if after being found guilty the defendant seeks a retrial in the interest of justice under Fed. R. Crim. P. 33 or its counterparts in state practice—perhaps because the evidence is at the borderline of legal sufficiency—the double jeopardy clause does not prevent a court from fulfilling the accused's request. *Tibbs v. Florida*, 457 U.S. 31 (1982); *Hudson v. Louisiana*, 450 U.S. 40 (1981). If it were impossible to hold a new trial when the evidence was close to the line

or otherwise questionable, then more defendants would stand convicted on weak evidence; courts would enforce thinly supported verdicts if the only alternative were acquittal. *Tibbs*, 457 U.S. at 45 n.22.

Rivera asked for a new trial rather than acquittal. The judge's statement that "the Court *could have* made a mistake in this case" (emphasis added) sounds like a conclusion that uncertainty justifies a new trial in the interest of justice. Other parts of the brief exposition sound more like a conclusion that the evidence just did not persuade him as trier of fact, which would amount to an acquittal. Which reading is best? Judge McSweeney-Moore (who was to preside at the second trial and denied Rivera's motion to dismiss), and the state's court of appeals (which affirmed on an interlocutory appeal), understood Judge Strayhorn the former way rather than the latter. Judge McSweeney-Moore remarked that Judge Strayhorn, who has served since 1970, knows how to enter an acquittal and would not have set the case for a new trial had he disbelieved the eyewitness. The court of appeals concurred in an unpublished order. *People v. Rivera*, No. 1-95-0978 (Ill. App. 1st Dist. Dec. 26, 1996). But the federal district court issued a writ of habeas corpus under 28 U.S.C. §2254, reasoning:

> The trial judge in this case had a legal obligation to deny the new trial motion (which was based on the sufficiency of the evidence) and sustain the conviction if he was convinced beyond a reasonable doubt of petitioner's guilt. We presume that he knew the law and applied it in making his ruling. The irresistible inference, therefore, is that by reconsidering the finding of guilt, vacating the conviction and ordering a new trial, the trial judge acquitted petitioner.

1998 U.S. Dist. LEXIS 2250 at *15 (citations omitted). Under the double jeopardy clause an acquittal in a bench trial is conclusive. *Finch v. United States*, 433 U.S. 676 (1977). Yet the cornerstone of the district judge's approach—the reason he thought that Judge Strayhorn *must*

have acquitted Rivera—is a belief that Illinois prohibits a judge from granting a retrial in the interest of justice following a bench trial; the judge must either convict or acquit. This contradicts the conclusion the state's appellate court reached in this very case, as well as other authority recognizing that in Illinois judges have *three* options following a bench trial: conviction, acquittal, or a new trial (because of legal errors in the first trial, or in the interest of justice). See *People v. Castiglione*, 75 Ill. App. 3d 469, 394 N.E.2d 607 (1st Dist. 1979); cf. Ill. Sup. Ct. R. 615(b); *People v. Jones*, 286 Ill. App. 3d 777, 676 N.E.2d 1335 (1st Dist. 1997). Federal judges may not issue writs of habeas corpus based on interpretations of state law that depart from the views the state courts themselves hold. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Evidence in the case was legally sufficient to convict Rivera. Someone shot and killed Weydowing LaPorte and tried to kill Jacqueline Vicario and Samuel Aponte, the passengers in his car. Vicario survived the spray of bullets and identified Rivera, a member of a rival gang, as the assassin. One eyewitness is enough, if the trier of fact believes that witness, as Judge Strayhorn did (at least immediately after the close of the evidence). *Burks*, which holds that an appellate court's decision that the evidence is insufficient precludes a retrial, therefore does not assist Rivera. (Because the state's appellate court examined the evidence and found it sufficient, the holding of *Richardson v. United States*, 468 U.S. 317 (1984), that *Burks* is limited to cases in which the court *did* find the evidence insufficient independently precludes reliance on *Burks*.) So unless there is compelling support for the conclusion that, despite the state courts' contrary decisions, Judge Strayhorn actually acquitted Rivera—which is to say, resolved in his favor at least one of the factual elements of the offense, see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)—the state is entitled to retry him.

One might suppose that whether Judge Strayhorn made such a finding is a question of fact, on which the state

courts' negative answer is presumed to be correct. 28 U.S.C. §2254(e)(1). (Because Rivera's petition was filed after April 24, 1996, we cite §2254 as amended by the Antiterrorism and Effective Death Penalty Act. See *Lindh v. Murphy*, 117 S. Ct. 2059 (1997).) Interpretation of an ambiguous statement by a judge does not present any question of constitutional law. The question is what the speaker sought to convey, not what a rule of law compels the state to do; it is a question of fact for the same reason that "the state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885). See *Banks v. Hanks*, 41 F.3d 1187, 1189 (7th Cir. 1994). In *Greene v. Massey*, 437 U.S. 19 (1978), a companion to *Burks*, the state court issued an ambiguous opinion that could have been read to say that the evidence was legally insufficient, but also could have been read in other ways. The Supreme Court held that the state courts should themselves determine the right way to understand their pronouncements. See also *Tibbs*, 457 U.S. at 47 n.24, another case in which the defendant insisted that a state court acquitted him: "the meaning attached to an ambiguous prior reversal is a matter of state law." Whether the meaning of Judge Strayhorn's oral statement is a question of fact or of state law, the upshot is the same: a federal court may not reach an independent conclusion on the subject, but must respect the state courts' resolution.

Nonetheless, the lawyers representing Illinois in this case have declined to rely on §2254(e)(1) and do not contend that state law is dispositive. Although *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), shows that we may disregard litigants' positions about choice-of-law issues, it is not necessary to follow that course today. Even if §2254(d) supplies the standard, the state must prevail. As amended by the AEDPA, this statute reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The state courts' conclusion that Judge Strayhorn did not acquit Rivera cannot be called "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." It is a plausible descrambling of an ambiguous oral remark. Likewise the state courts' conclusion cannot be called "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". No rule of federal law tells state courts how to interpret ambiguous judicial statements; as *Greene* and *Tibbs* say, the subject is not governed by federal law at all. Necessarily, therefore, the state courts did not apply the (nonexistent) federal law unreasonably.

The only rule of federal law in the picture is the norm that an acquittal following the attachment of jeopardy bars a second trial. *Sanabria v. United States*, 437 U.S. 54 (1978); *Fong Foo v. United States*, 369 U.S. 141 (1962). (It does not preclude the possibility of replacing the acquittal with a conviction, if that can be done without a second trial. *United States v. Wilson*, 420 U.S. 332 (1975).) But whether Judge Strayhorn resolved in Rivera's favor one or more of the factual elements of the offense, and thereby acquitted him, is a subject to which constitutional law does not speak. This is one of the many subsidiary issues that a court must decide in the course of applying law to the facts of a given case, and which under §2254(d)(1) may

be overturned in collateral litigation only if the state court has acted unreasonably. See *Lindh v. Murphy*, 96 F.3d 856, 868-71 (7th Cir. 1996) (en banc), reversed on other grounds, 117 S. Ct. 2059 (1997). See also *Neelley v. Nagle*, 138 F.3d 917, 922-27 (11th Cir. 1998). Judge Strayhorn did not say that he was acquitting Rivera or resolving any factual issue in his favor, and the Illinois courts did not act unreasonably in concluding that the order was not an acquittal.

REVERSED

CUDAHY, *Circuit Judge*, concurring. It seems to me that the reality of what Judge Strayhorn said and did may be reached a bit more directly than along the path followed by the majority.

The majority opinion speaks of a "retrial in the interest of justice . . . perhaps because the evidence is at the border line of legal sufficiency." *Ante* at 2. In common parlance, I take this to be a reference to what follows a determination that a verdict is against the *weight* of the evidence. *See Tibbs v. Florida*, 457 U.S. 31, 42 (1982). In the briefs of the parties and in the district court's opinion there is much discussion of the difference between a verdict that is against the weight of the evidence and one that is not supported by sufficient evidence. A verdict that is against the weight of the evidence may be followed by a retrial without violating the bar against double jeopardy. *See, e.g., id.* On the other hand, a verdict that is not supported by legally sufficient evidence operates as an acquittal and the principles of double jeopardy preclude a trial. *See Burks v. United States*, 437 U.S. 1 (1978).

However, here the defendant argues that "the distinction between reversals based on the legal insufficiency of the evidence and those where a reviewing court disagrees

with the trier of fact's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence, . . . simply do not apply where, [as in the present case], the judicial entity which set aside the guilty verdict is the same judicial entity that made the initial finding of guilty." Appellee's Br. at 8-9 (internal quotations omitted). The defendant also attributes to the district court the view that the "distinction between reversals based on insufficiency and those based on weight is meaningless in situations where . . . the trier of fact was the same entity as the person or court setting aside the conviction." *Id.* at 9. And the district court seems to take this analysis one step farther when in its opinion it says, "To say that [Judge Strayhorn] granted a new trial because he personally weighed the evidence and was unconvinced is, therefore, the same as saying he acquitted the defendant." Appellant's Br., App. A (Dis. Ct. Mem. Op. at 10).

But it seems to me that if, as it appears, Judge Strayhorn's decision was that his prior decision was against the weight of the evidence, then his decision on the defendant's motion was to vacate and nullify his prior decision and, in effect, to decline to make a decision. That his prior decision may, on second thought, have appeared to have been against the weight of the evidence does not mean that it was unsupported by substantial evidence. From this perspective, Judge Strayhorn granted a new trial because he had withdrawn and vacated the decision that he had previously made. His stance in declining to decide was analogous to that of a hung jury.

Retrial after a jury fails to reach a verdict is not barred by considerations of double jeopardy. *See, e.g., Richardson v. United States*, 468 U.S. 317, 323-25 (1984). Similarly, the failure or refusal of a judge at a bench trial to enter a decision presumably has no double jeopardy effect. *Cf. Wade v. Hunter*, 336 U.S. 684, 688-89 (1949). And the same result would follow when after a bench trial a judge vacates a decision already made. This is certainly the case if the defendant *sought* a new trial based on the setting

aside of the decision reached in the first one. *See North Carolina v. Pearce*, 395 U.S. 711, 720 (1969). Whether it would be equally the case if the court *sua sponte* vacated its own decision (assuming that this were authorized) need not be decided here. Judge Strayhorn was, after all, responding to a motion.

The district court, reviewing the arguments made to Judge Strayhorn, his review of the evidence and other related factors, stated: "We find clear from the record that the judge vacated the conviction because, in light of the evidence, he was not convinced beyond a reasonable doubt of petitioner's guilt." Appellant's Br., App. A (Dis. Ct. Mem. Op. at 8). Significantly, the district court did not find that Judge Strayhorn vacated the conviction because no reasonable factfinder could have been convinced beyond a reasonable doubt of Rivera's guilt; the district judge did not say that "acquittal was the only proper verdict." *Tibbs*, 457 U.S. at 42. Even if the district court's reading of Judge Strayhorn's record is correct, the judge's after-acquired reasonable doubt serves only to vacate the prior decision, not to modify it into an acquittal. His doubt is not, as I have indicated, "the same as saying he acquitted the defendant." *See id.* at 42 n.17 ("disagreements among jurors or judges do not themselves create a reasonable doubt of guilt"). Hence, there is no double jeopardy here.

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APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 1, 1999.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

EDWARDO RIVERA,
Petitioner-Appellant,

No. 98-1703 **v.**

SHERIFF OF COOK COUNTY,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 97 C 3581
John F. Grady, *Judge.*

Order

Petitioner-Appellee filed a petition for rehearing and petition for rehearing en banc on December 30, 1998.

No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

97-3581.981-MEV February 17, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. EDWARDO RIVERA,	)	
Petitioner,	)	
v.	)	No. 97 C 3581
SHERIFF OF COOK COUNTY	)	
Respondent.	)	

REVISED MEMORANDUM OPINION

Before the court is Edwardo Rivera's petition for a writ of habeas corpus based on the Double Jeopardy Clause. For the reasons explained below, the petition is granted.

BACKGROUND

On March 30, 1993, Weydowing LaPorte, Jacqueline Vicario and Samuel Ponte were driving home from a movie

around midnight when a car pulled up behind them and shone bright lights into their car. The second car then pulled alongside them, and a man with a mustache and goatee fired gun shots into their car, killing LaPorte. One month later, petitioner was arrested and charged with the crime. Petitioner was tried before a judge rather than a jury, The main evidence presented against him was the testimony of Jacqueline Vicario. *[page 2]*

At trial, petitioner's attorney elicited testimony from Vicario that indicated the bright light adversely affected her vision during the crime. About 35 days after the crime, Vicario viewed a photographic spread and, that evening, she was shown a line-up. Tr.,

38-39. Her testimony also implied that the line-up procedures were suggestive. For example, Vicario identified petitioner out of a line-up in which he was the sole person with a mustache and goatee.

> Q: And in fact none of the other men in the line up had a goatee, did they?
>
> A: No they didn't.
>
> Q: Huh?
>
> A: No they didn't.
>
> Q: So you were only shown one picture of one man in a line up who had a goatee, correct?
>
> A: Yes.

Transcript of the Proceedings, Oct. 5, 1994 (Tr.), 39. Vicario also stated that she only picked petitioner out of the line-up after having seen his photograph and having been told that

that very person would be in the line-up.

> Q: [The police officer] told you that the person whose picture you picket out you were going to see in the pine up?
>
> A: Yes.
>
> Q:And he told you that your job at the line up was to see if the person whose picture you were on was on fact in the line up?
>
> A: Yes. *[page 3]*
>
> Q: And so you went to the line up and you said to the police officer, 'the man whose picture I picked out I now see him in the line up,' correct?
>
> A: Yes.

Tr., 38-39. Vicario also admitted at trial that she told private detectives -- who she thought were police officers -- that she was unsure about the identification she had made.

> Q: Well did they, let me ask you this question: Let me ask you what,

were these questions put to you and did you give these answers.

> Question: 'If you were sworn under oath in a Court of law before a judge or jury and they said is this the man who shot [the victim] in front of you, could you positively say it was or absolutely say it as him?'
>
> Answer: 'No.'
>
> 'Are you sure?'
>
> Answer: 'Yes.'
>
> Question: 'No way?'
>
> Answer: 'No.'

Were those questions and answers put to you?

A: Yes.

Q.So you told them that you weren't sure, correct?

A: Yes.

Tr., 36

Q: You thought [the detectives] were from the police right?

A: Yes.

> Q: So you told people who you thought were, in your opinion, part of the Chicago police that you were not sure about your identification, correct? *[page 4]*
>
> A: Yes.
>
> Q: And you told people who you believed that you were doubtful about your ability to make an identification?
>
> A: Yes.

Tr. at 49.

The other witness in the car stated that the petitioner resembled the assailant, but only offered a tentative identification. See Respondent's Ex. H,at 5. Petitioner testified that he did not commit the crime. On November 10, 1995, the trial judge found petitioner guilty of murder, attempted murder and aggravated discharge of a firearm. He permitted petitioner to remain free on bond until sentencing.

Petitioner filed a motion for a new trial, arguing that Vicario's identification was insufficient evidence on which to convict him. On January 13, 1995, after hearing oral arguments, the trial judge granted the motion for a new trial.

> The Court: This being a single witness identification case in essence the law is a single witness must convince the trier of fact beyond a reasonable doubt of that identification.
>
> Next going over the transcripts and listening to arguments the Court is of the opinion that the Court could have made a mistake in this case.
>
> And this being a murder case I am not going to take the chance of my mistake leading this man to be wrongfully convicted.
>
> I am going to grant his motion for me to reconsider. I will vacate the finding of guilt, reinstate his plea of not guilty. And I am going to order that he be back here to stand trial before another Judge in this courtroom on February 6th.

[page 5] Transcript of the Proceedings, Jan.13, 1995, 6-7. Petitioner filed a motion for double jeopardy discharge before the new judge, but the motion was denied. Remaining free on bond,[1] petitioner appealed that decision. The Illinois Appellate Court affirmed the judgment, and the Illinois Supreme Court denied a Petition for Leave to Appeal.

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[1] Even though petitioner is free on bond, he is still in "custody" under § 2254. See Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (establishing that a person released on bail on his own recognizance is in custody for purposes of the habeas statute because he is still under restraint); Delk v. Atkinson, 665 F.2d 90, 93 (6th Cir. 1981) (holding that petitioner was in custody even though he was free on bail when he filed his habeas application based on double jeopardy grounds); see also Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 408 (7th Cir. 1985) (recognizing that a person out on bail is still in custody for purposes of the habeas corpus statute).

DISCUSSION

A federal court may grant a writ of habeas corpus when, under a state court judgment, a person is held in custody in violation of the United States Constitution. 28 U.S.C. § 2254 (1996); Bocian v. Godinez, 101 F.3d 465, 468 (7th Cir. 1996). Before a federal court will consider the merits of a habeas petition, the applicant must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A); Picard v. Connor, 404 U.S. 270, 275 (9(1971); Jones v. Washington, 15 F.3d 671, 674 (7th Cir. 1994). The applicant also must fairly present any federal claims in state court first, or risk procedural default. Verdin v. O'Leary, 972 F.2d 1467, 1472-73 (7th Cir. 1992).

[page 6]

Under the federal habeas statute, a State court's findings of fact are presumptively correct. 28 U.S.C. § 2254(e)(1).[2] A petitioner may challenge them, but the facts are rebutted only by clear and convincing evidence. Id. As to legal issues, this court may grant a writ of habeas corpus only when the lower court's holding is "contrary to" or an "unreasonable application of" United States Supreme Court precedent.

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[2] Section 2254 (e)(1) reads: In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (d) (1) & (2).[3]

Petitioner argues that the second trial subjected him to double jeopardy and thus, violated his rights under the Fifth and Fourteenth Amendments. See U.S. CONST. amend. V & XIV. He relies

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[3] The language of 28 U.S.C. § 2254 reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

on Hudson v. Louisiana, 450 U.S. 40 (1981), for the proposition that when a trial court grants a motion for a new trial on the basis that there may be reasonable doubt of the defendant's guilt, the Double Jeopardy Clause mandates that the defendant cannot be *[page 7]* retried. It is undisputed that petitioner has exhausted his state court remedies.

Respondent argues that the Double Jeopardy Clause does not bar retrial because the trial judge's order was not an acquittal. First, the judge may have ordered the new trial in order to correct procedural errors that occurred during the first trial. For example, in petitioner's written motion for a new trial, he argued that the evidence was

insufficient to sustain a conviction, that hearsay testimony was erroneously admitted, and that admission of other evidence denied him due process. If trial errors were the basis for ordering the new trial, the Double Jeopardy Clause does not bar retrial. See Tibbs v. Florida, 457 U.S. 31, 40 (1982) (explaining that a defendant whose conviction has been set aside as a result of a defect in the trial may be retried because society would pay too high a price if a retrial were barred in those circumstances).

Petitioner replies that the only issue he orally argued before the trial court was whether the evidence, in particular Vicario's hesitant identification of petitioner, was

sufficient to sustain his conviction. Transcripts of the proceeding support this contention. See Respondent's Ex. H. The trial judge's statement, made immediately following oral arguments, referred only to the sole witness testimony and the need to be convinced of the identification beyond a reasonable doubt. The judge stated that he *[page 8]* had reviewed the transcripts -- a fact that suggests evidentiary review -- and considered the oral arguments. At that point, he expressed his concern that he had made an error and that petitioner could have been "wrongfully convicted." Petitioner argues that the phrase "wrongful conviction," implies innocence, not a case where proof of guilt had been

sufficient but a new trial was necessary because of trial defects. At no time did the judge even suggest that a trial error was the reason for granting the new trial. We find clear from the record that the judge vacated the conviction because, in light of the evidence, he was not convinced beyond a reasonable doubt of petitioner's guilt.

Respondent next argues that even if the judge was unconvinced by the evidence, that does not necessarily signify an acquittal barring retrial under the Double Jeopardy Clause. Relying heavily on Tibbs v. Florida, respondent says there is a distinction between ordering a new trial because the evidence is insufficient to convict and ordering a new trial because the weight

of the evidence is unconvincing to the judge. In the former case, the Double Jeopardy Clause precludes retrial because it means that no reasonable fact finder could have voted to convict the defendant. Hudson, 450 U.S. at 44-45 (citing Burks v. United *[page 9]* States, 437 U.S. 1 (1978)); see also Tibbs, 457 U.S. at 40-41. Such a finding has the force of an acquittal.[4]

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[4] Some cases have held that this type of an acquittal may be appealed, reversed and the original conviction reinstated. See United States v. Greer, 850 F.2d 1447, 1449 (11th Cir. 1988) (stating that a post-verdict acquittal based on insufficient evidence maybe appealed without violating the Double Jeopardy Clause because reversal would not result in further fact-finding proceedings); United States v. Singleton, 702 F.2d 1159, 1161-62 (D.C. Cir. 1983) (same); United States v. Steed, 674 F.2d 284, 286 (4th Cir. 1982) (vacating a panel decision that had accorded absolute deference to the trial judge's finding that the evidence was

However, the result is different when the judge grants a new trial because he personally weighs the evidence, disagrees with the jury's resolution, and concludes that the verdict is against the weight of the evidence. Tibbs, 457 U.S. at 42. In that case, the judge acts as the "13th juror," and the circumstances do not signify an acquittal. Id. (analogizing this situation to a hung jury, which does not bar retrial under the Double Jeopardy Clause). A reversal based on the weight of the evidence, then, "simply affords the defendant a second opportunity to seek a favorable judgment." Id. at 43. In this case, respondent argues, the trial judge never

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insufficient).

specifically stated that he was ordering a new trial because the evidence was insufficient to sustain the conviction. Indeed, he would not have ordered a new trial before a different judge if the evidence was insufficient. Moreover, the Illinois Appellate Court specifically found that the evidence was sufficient to sustain the conviction. See infra note 4. Thus, reasons respondent, "the trial judge in this case set aside petitioner's conviction and granted a new trial because of the weight, rather *[page 10]* than sufficiency, of the evidence." and consequently, retrial was not barred by the Double Jeopardy Clause. See Answer to Petition for Writ of Habeas Corpus, at 21.

Petitioner argues that the distinction urged in Tibbs is meaningless in this situation because the judge was the self-same trier of fact. For example, the Tibbs rationale has only been applied to situations where the trier of fact was a different entity from the person or court setting aside the conviction. See e.g., Tibbs, 457 U.S. at 38-39 (new trial permissible where jury rendered initial verdict and Florida Supreme Court reversed because certain findings of fact were questionable); State v. Dasher, 297 S.E.2d 414, 416-17 (S.C. 1982) (conviction stands where jury rendered a verdict of guilty but trial judge set aside the conviction, apparently because of his assessment of a witness's

credibility). In a case such as this, where the trial judge was himself the trier of fact, it was impossible for him to act as the "13th juror." When he vacated the conviction because of his doubts about the evidence, petitioner argues, he was necessarily finding reasonable doubt of petitioner's guilt. To say that he granted a new trial because he personally weighed the evidence and was unconvinced is, therefore, the same as saying he acquitted the defendant. The fact that the judge actually ordered a new trial rather than a formal acquittal does not defeat this conclusion. See Hudson, 450 U.S. at 43-44 (determining that the grant of a new *[page 11]* trial following a conviction was actually an acquittal);

see also Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986) (holding that grant of demurrer was actually an acquittal); United States v. Sisson, 399 U.S. 267, 290 (1970) (determining that "arrest of judgment" following a conviction was actually an acquittal). This is true because the court's duty is to analyze the substance of the ruling, not the label attached to it. See, e.g., Sisson, 399 U.S. at 290 (stating that "the trial judge's characterization of his own action cannot control the classification of the action"). Moreover, a defendant does not waive his right to a judgment of acquittal by moving solely for a new trial. United States v. Burks, 437 U.S. 1, 17 (1978). Petitioner concludes that because the

trial judge expressly predicated his ruling on his doubt of petitioner's guilt, his ruling was an acquittal. See Hudson, 450 U.S. at 43.

Respondent does not address this argument, and points to no cases in which the person vacating the conviction is the very *[page 12]* person who made the finding of guilt.[5] The Illinois

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[5] We are aware of two cases in which a conviction following a bench trial was set aside by the trial judge. See United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Kellerman, 729 F.2d 281 (4th Cir. 1984). Both cases are distinct from the one before us because the judge vacated the conviction after resolving legal issues unrelated to factual guilt or innocence. See Ceccolini, 435 U.S. at 270-71 (court vacated conviction after it granted defendant's motion to suppress the key piece of evidence against him); Kellerman, 729 F.2d at 283(district court set aside conviction because, as a matter of law, the check at issue was worthless and so defendant could not have misapplied funds). The government

Appellate Court did not discuss this aspect of the case.

The trial judge in this case had a legal obligation to deny the new trial motion (which was based on the sufficiency of the evidence) and sustain the conviction if he was convinced beyond a reasonable doubt of petitioner's guilt. See e.g., United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992) (holding that jury was properly instructed that it has a duty to convict if convinced beyond a reasonable doubt of defendant's guilt, and stating that such instruction was

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was entitled to appeal the orders setting aside the finding of guilt because in the event of a reversal, no new trial would be necessary in that the reviewing court could simply reinstate the conviction.

legally accurate). We presume that he knew the law and applied it in making his ruling. See Walton v. Arizona, 497 U.S. 639, 653 (1990). The irresistible inference, therefore, is that by reconsidering the finding of guilt, vacating the conviction and ordering a new trial, the trial judge acquitted petitioner.

This conclusion is consistent with the Supreme Court's definition of an acquittal - a precedent the Illinois Appellate Court disregarded entirely. See Smalis, 476 U.S. at 144 & n.6; *[page 13]* Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 309 (1984); Swisher v. Brady, 438 U.S. 204, 226 (1978) (dissent); United States v. Scott, 437 U.S. 82, 97 (1978); Sanabria

v. United States, 437 U.S. 54, 71 (1978); Burks, 437 U.S. at 10; United States v. Martin Linen Supply Co., 430 U.S. 564, 5781 (1977); see also Sisson, 399 U.S. at 290. An acquittal occurs when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." Scott, 437 U.S. at 97 (quoting Martin Linen, 430 U.S. at 571). This definition focuses on a resolution of factual issues, not on grounds unrelated to guilt or innocence. Id. at 98 & n.11 (commenting that a prejudicial pretrial delay does not relate to guilt or innocence, but hypothesizing that the

insanity defense does).[6] Here on the motion for a new trial, the issue before the trial judge (and fact-finder) was petitioner's guilt or innocence. In particular, the question was whether the eyewitness identification could establish petitioner's guilt beyond a reasonable doubt. In ruling on the motion, the trial judge resolved the issue in petitioner's favor.

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[6] Scott explained the rationale:

> [A] defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes. Stone v. Powell, 428 U.S. 465, 490 (1976).

Id.

Subjecting a person to post-acquittal fact finding *[page 14]* proceedings going to guilt or innocence violates the Double Jeopardy Clause. Smalis, 476 U.S. at 145. Because petitioner may not be retried, we grant the petition for writ of habeas corpus.

CONCLUSION

The court concludes that the petitioner is in the custody of respondent[7] in violation of the

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[7] Since petitioner is free on bond, no one has actual custody of him. But, as the Seventh Circuit explained, "[t]he important thing is not the quest for a mythical custodian, but that the petitioner name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit -- namely, his unconditional freedom." Reimnitz, 761 F.2d at 409. In the case of a person out on bail, the court identified two possible

Constitution of the United States. Accordingly, a writ of habeas corpus will issue, ordering respondent to release the petitioner unconditionally, forthwith and without retrial.

DATED: February 17, 1998

ENTER:

[Signature]
John F. Grady, United States District Judge

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respondents: the Sheriff of Cook County and the circuit court of Cook County. Id. at 408-09 (reasoning that it was proper for petitioner to name the circuit court as respondent). Thus, it was proper for petitioner to name the Sheriff as respondent.